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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CHUNG KAO, Plaintiff and Appellant, v. ROLANDO SORIA, et al., Defendants and Respondents.	A151399 (Marin County Super. Ct. No. CIV1501815)

A prisoner sued correctional officers for conversion and negligence based on the disposal of a typewriter and a bottle of glue that were confiscated from his cell. He appeals from a judgment of dismissal after the trial court sustained the officers' demurrers without leave to amend. We affirm.

BACKGROUND

A.

Chung Kao is a prisoner at San Quentin State Prison. He filed a complaint with the following allegations.

Kao had, in his cell, a typewriter and a bottle of glue that were "authorized by the [California Department of Correction and Rehabilitation's (Department's)] regulations as allowable inmate 'personal property' and [were] duly purchased through [the Department's] special purchase procedure that" permits inmates to purchase and possess

"entertainment appliances and handicraft materials." Attached to his complaint are receipts for the typewriter ($179.97) and the glue ($2.05).

Correctional officers confiscated the typewriter and glue during a search of his cell. The officers explained that they found a cell phone and charger hidden in the typewriter; Kao later confessed to hiding the items there and was disciplined. The glue was deemed contraband. Kao contends that, once the items were confiscated, prison regulations permitted him to mail the typewriter and glue home. The officers did not return the items to Kao or allow him to mail them home. Kao filed a prison grievance and a government claim (see Gov. Code, § 810 et seq.), which were denied.

B.

Kao alleged causes of action for conversion and negligence against the officers. (See Gov. Code, § 820 [liability of public employees for personal injuries].) The officers demurred, arguing the typewriter was contraband because it was used to conceal contraband (i.e., the cellphone and charger) and Kao alleged no facts giving him a right to possess the glue. The court sustained the demurrer without leave to amend.

DISCUSSION

A.

We review an order sustaining a demurrer de novo. (*Ortega v. Contra Costa Community College Dist.* (2007) 156 Cal.App.4th 1073, 1080.) " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] . . . When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

We interpret statutes using the de novo standard of review (see *Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 582), and we apply the

standard rules of statutory construction to regulations (*In re Espinoza* (2011) 192 Cal.App.4th 97, 104).

B.

We begin with an overview of the pertinent regulations and statutes.

Prisoners have a right to own personal property, subject to regulations that are reasonably related to legitimate penological interests. (Pen. Code, §§ 2600, 2601, subd. (a); see *Turner v. Safley* (1987) 482 U.S. 78.) This right, however, does not entitle a prisoner to possess property inside a prison. (*In re Alcala* (1990) 222 Cal.App.3d 345, 370–371; see Cal. Code Regs., tit. 15, § 3192.)[1] Statutes and regulations determine what items a prisoner may possess inside a prison.

Prisoners may possess "authorized personal/religious property items" based on their privileges, institutional security level, and disciplinary records. (§ 3190(a).) Regulations set forth lists of personal property that prisoners are authorized to possess. (§ 3190(b)–(d), (h)–(r); see, e.g., California Department of Corrections and Rehabilitation Adult Institutions, Programs and Parole Operations Manual (Jan. 1, 2019) [Manual], § 54030.18 [schedule for level I, II, III male inmates at camps and community facilities].)

Possession of contraband "may result in disciplinary action and confiscation of the contraband." (§ 3006.) Contraband generally includes "anything which is not permitted, in excess of the maximum quantity permitted, or received or obtained from an unauthorized source." (§ 3000; see also Manual, § 54030.10.11 [defining contraband also to include items "no longer functioning as designed or that have been modified or tampered with"].) Additionally, regulations designate some specific items as contraband, such as cell phones. (See § 3006(c)(20).)

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[1] All further section references are to title 15 of the California Code of Regulations unless otherwise indicated.

We note the rules are not a model of clarity, due in part to similar, undefined terms used interchangeably (e.g., unauthorized, not permitted, nonallowable). We shall give them a reasonable and commonsense interpretation consistent with their apparent purpose. (See *Dept. of Corrections & Rehabilitation v. State Personnel Bd.* (2015) 238 Cal.App.4th 710, 721–722.)

C.

Kao concedes that the typewriter was unauthorized at the time it was seized and thus was contraband subject to confiscation, but he maintains he had a right under prison rules to mail it home. We conclude he has not identified such a rule.

Kao cites section 3191, which allows prisoners to mail home "nonallowable personal property which is unauthorized." (See § 3191(c)(1).) Kao contends this applies to items that prisoners had been authorized to possess, at some point in the past, but are no longer authorized to possess. We agree with Kao to an extent. For example, a prisoner may mail home items that are generally allowable—that is, when acquired, they were on the lists of allowable property—but became unauthorized because the prisoner's total volume of property exceeds the limit (see § 3190(e)), or the inmate lost certain privileges (see § 3190(*l*)(2); see also § 3191(c) [prisoners may mail home items unauthorized pursuant to § 3190].) It may also include authorized items that have been improperly "altered." (Manual, § 54030.12.2.) Section 3191(c), however, specifically distinguishes "contraband pursuant to section 3006(a) or (c)" and permits prison officials to dispose of such contraband even if it previously was authorized property.

The typewriter was contraband at the time it was seized. Contraband includes items that "contain . . . contraband." (§ 3006(c)(3).) Cell phones and chargers are contraband. (§ 3006(c)(20.) So when Kao hid the cell phone and charger in the typewriter, the typewriter was converted from an authorized item to contraband and was subject to confiscation and disposal. (§ 3191(c) [property that is contraband under § 3006(c), may be seized and disposed of]; § 3006(c)(3).) Even if the typewriter had

once been authorized but was later improperly altered to hide the cell phone (see Manual, § 54030.12.2 [altered items may be mailed home]), the fact remains it *contained* contraband, putting it squarely in a category of contraband that prison officials may discard. (§§ 3006(c)(3), (20), 3191(c).)

We reject Kao's remaining arguments. Kao contends the regulations do not serve a legitimate penological purpose because any security concern related to the typewriter was addressed once it was removed from Kao's possession; thus, mailing it home would have posed no added risk. (See Pen. Code, § 2600.) But concealing contraband such as cell phones is a serious problem for prisons (see § 3315(a)(3)(X)[possession of cell phone is serious rule violation]), and it is entirely legitimate to confiscate the typewriter as a deterrent to Kao and other prisoners. (Cf. *In re Espinoza*, *supra*, 192 Cal.App.4th 97 at p. 108 [deterrence is a legitimate penological interest].) We have reviewed Kao's other arguments and find them to be without merit.

In short, Kao does not convince us the officers owed him a duty to allow him to mail home the typewriter. As to the typewriter, then, the trial court properly sustained the demurrer without leave to amend. (*See Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128 [tort liability of public officials requires duty of care].)

D.

As to the glue, Kao has not alleged facts establishing the item was authorized personal property that may be mailed home under section 3191(c), rather than contraband.

Kao alleges the glue was "authorized by the CDCR regulations as allowable 'personal property' and . . . plaintiff duly purchased [it] through CDCR's 'special purchase' procedure that permits inmate purchase and possession of . . . handicraft materials." (See § 3190(k)(5).) But the purchase receipt he attached to his complaint shows a bottle of glue was mailed to him at a San Diego prison in 2012. Kao cites no allegations or regulation that authorized him to possess the glue in San Quentin. (See

§ 3190(f) [screening process for personal property when prisoner is transferred].) Inmates are authorized to purchase handicraft materials if they have obtained "approval by handicraft manager and designated custody staff." (§ 3190(k)(5); see Manual, § 54030.18.7.2.) Kao does not allege his possession of the glue was approved by appropriate personnel at San Quentin. Nor does he argue in his reply brief that he can amend the complaint to add the necessary allegations, even though the issue was raised in the trial court and on appeal. (See *Zelig, supra,* 27 Cal.4th at p. 1126 [plaintiff has the burden of showing amendment could cure defect in complaint].) We therefore conclude the trial court properly sustained the demurrer as to the glue as well.[2]

DISPOSITION

The judgment is affirmed. Kao shall bear the officers' costs on appeal.

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[2] We deny Kao's September 27, 2018 motion to augment the record, which addressed a defense procedural argument we do not credit. We deny Kao's December 26, 2017 request for judicial notice because it is unnecessary as to the regulations and prison manual (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45–46, fn. 9 ["request for judicial notice of published material is unnecessary"; "[c]itation to the material is sufficient"]), and because it otherwise improperly seeks judicial notice of evidence that is reasonably subject to dispute (Evid. Code, §§ 451, subd. (f), 452, subds. (g), (h), 459, subd. (a)).

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BURNS, J.

WE CONCUR:

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SIMONS, Acting P. J.

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NEEDHAM, J.

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